

April 22, 2013

The Honorable Julius Genachowski Chairman Federal Communications Commission 445 12th Street, SW Washington, DC 20554

Re:

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

Dear Chairman Genachowski:

We write on behalf of the Congressional Black Caucus (CBC) and its working group on Prison Telecomm Reform¹ in response to the above-referenced Notice for Proposed Rulemaking (NPRM)² regarding the reasonableness of rates charged for inmate calling services. Together, our members represent more than 20 states as well as the District of Columbia and the U.S. Virgin Islands.

Nearly 12 years after named plaintiff, Martha Wright, filed a national, class-action lawsuit in the United States District Court for the District of Columbia (the Court) along with other petitioners, including inmates and their family members, the Federal Communications Commission (FCC) opened the instant NPRM. In their class action complaint, the plaintiffs challenged, among other things, the legality of "exclusive dealing contracts" between Corrections Corporations of America (CCA) facilities and telephone companies. The plaintiffs were particularly opposed to paying for long distance calls made to and received from prisons and correctional facilities, which typically included expensive and even cost-prohibitive per-call and per-minute charges of as much as \$4.00 per call and \$.55 per-minute. Defendants, CCA

¹ The members of the CBC Prison Telecomm Reform Working Group are Representatives Eleanor Holmes Norton (DC), Bobby Rush (IL), Bobby Scott (VA), G.K. Butterfield (NC), Donald Payne Jr. (NJ), John Lewis (GA) and Hank Johnson (GA).

² Rates for Interstate Inmate Calling Services, 78 Fed. Reg. 436 (Proposed Dec. 28, 2012) (to be codified at 47 C.F.R. Pt. 64) [hereinafter NPRM].

³ Wright v. Corrections Corp. of America, C.A. No. 00-293 (GK), Memorandum Opinion, slip op. at 2 (D.D.C. Aug. 22, 2001) [hereinafter Wright Petition].

⁴ Id. at 2.

⁵ *Id.* CCA is a publicly traded company based in Nashville, Tennessee, which owns, operates, and manages privatized correctional and detention facilities in the United States. As of December 31, 2012, CCA owned and

and several telephone companies, subsequently filed a Motion to Dismiss, citing the primary jurisdiction of the FCC over the matter due to its statutory authority under the Communications Act of 1934 (the Act). The Court agreed that the FCC was the expert agency and found that the FCC had "explicit statutory authority" to: (1) "regulate inmate payphone services;" (2) "consider plaintiffs' request to have access to other calling options;" and (3) "regulate the reasonableness of rates."

I. THE FCC HAS JURISDICTION OVER INTERSTATE AND INTRASTATE INMATE TELECOMMUNICATIONS SERVICES

A plain reading of §§ 276 and 201 of the Act indicates that the FCC has broad authority to regulate *both interstate and intrastate inmate calling services* to ensure that the rates of inmate calling services are reasonable. The Act provides that the FCC can "prescribe such rules and regulations as may be necessary in the public interest" to carry out the provisions related to service and charges of inmate telephone services. The Act also provides that the FCC shall "prescribe regulations that establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for *each and every* completed *intrastate and interstate call*," and that all charges should be "just and reasonable." The FCC has historically left the regulation of intrastate inmate calls to the states, particularly non-inmate calls, and some may read the general guiding provisions in §152 of the Act to bar FCC jurisdiction over intrastate calls. However, the plain language of §§ 276 and 201 leaves no doubt that, as to inmate calls, the FCC's jurisdiction covers both interstate and intrastate telephone calls. Moreover, Congress included a preemption clause (§ 276) to further clarify FCC jurisdiction. This section provides, "To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." ¹⁰

The CBC is concerned about both interstate and intrastate inmate calls because we believe that, as a practical matter, inmates call loved ones within a state and outside of a state, depending upon the location of relatives, friends and the prison. State prisoners making intrastate calls should not be denied the equal protection of reasonableness regulations when the FCC is statutorily charged with developing such regulations. In 2011, there were over 1.3 million state prisoners compared to 216,362 federal prisoners. The FCC alone could regulate all of these calls without there being unfair differences from state to state.

The fact that a few states, under pressure from families, have begun to take action to lower prison telephone rates further shows that FCC intervention is necessary and timely, and points to the necessity to treat inmates and their families equally. As noted in the Prison Legal News Report, eight states have banned commissions on calls, three states have reduced their

managed 47 correctional and detention facilities, and managed 20 correctional and detention facilities that it did not own.

⁶ *Id.* at 6-8.

⁷ 47 U.S.C. § 201(b); 47 U.S.C. § 276(d) (defining payphone service to include "inmate telephone service in correctional institutions, and any ancillary service").

⁸ 47 U.S.C. § 276(b)(1)(A) emphasis added.

⁹ 47 U.S.C. § 201(b).

^{10 47} U.S.C. § 276(c).

¹¹ BUREAU OF JUSTICE, *Prisoners In 2011*, 1, 2 (2012) *Available at* http://bjs.gov/index.cfm?ty=pbdetail&iid=4559 [hereinafter Bureau of Justice Stats].

commissions, and one state has entered into a limited commission contract. ¹² While these actions to ban commissions show that regulation is needed to ensure just and reasonable rates, state action alone cannot ensure reasonable rates for all inmate calls. The FCC, however, has authority over all inmate calls.

II. EXORBITANT INMATE TELEPHONE RATES DISPROPORTIONATELY AND NEGATIVELY IMPACT AFRICAN AMERICAN AND HISPANIC INMATES, FAMILIES AND COMMUNITIES

The CBC is deeply troubled by the disproportionate and malignant impacts that exorbitant inmate telephone rates have on African American and Hispanic families and communities. Over 60 % of incarcerated prisoners are African American or Hispanic. According to recent Bureau of Justice statistics, African Americans comprised 38.82% and Hispanic Americans comprised 22.63% of the combined federal and state prison populations. In 2011, Blacks and Hispanics were "imprisoned at higher rates than whites in all age groups for both male and female inmates," and "among prisoners ages 18 to 19, black males were imprisoned at more than 9 times the rate of white males." These striking figures strongly suggest that minority families and consumers are being forced to have to make excessive expenditures at levels that are far out of proportion to their relative numbers in the overall population.

A number of scholarly studies, reports and personal comments from inmates and their families all point to a powerful correlation between regular communication between inmates and their families and measurable decreases in prisoner recidivism rates. ¹⁵ At a congressional hearing, entitled "Housing D.C. Felons Far Away from Home: Effects on Crime, Recidivism, and Reentry," before the Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, Nancy LaVigne, the Director of the Justice Policy Institute at the Urban Institute, stated:

Our studies have found that families are an important influence on the reentry process and they provide much needed support to returning prisoners....In fact, our research has found that in-prison contact with family members is predictive

¹² PRISON LEGAL NEWS, Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks at 7 (April 2011), available at https://www.prisonlegalnews.org/23083 displayArticle.aspx.

¹³ Bureau of Justice Stats at 8.

¹⁴ *Id*.

¹⁵ See PRISON PHONE JUSTICE, Outrageous Phone Rates Devastate Families, Available at: http://prisonphonejustice.org/Default.aspx; Goad, David. Statement to the House, Subcommittee on Communications, Technology & the Internet at 5, H.R. 1133, the Family Telephone Connection Protection Act of 2009, Hearing, June 11, 2009; Krough, Frank. Statement to the House, Subcommittee on Communications, Technology & the Internet at 4-5, H.R. 1133, the Family Telephone Connection Protection Act of 2009, Hearing, June 11, 2009 Available at: http://democrats.energycommerce.house.gov/index.php?q=hearing/hearing-on-hr-1147-hr-1133-and-hr-1084-subcommittee-on-communications-technology-and-the-int. See e.g., Creasie Finney Hairston, Family Ties During Imprisonment: Do They Influence Future Criminal Activity?" 54 FED. PROBATION 48, 49 (1988) (citing numerous scholars who have found a "strong and consistently positive relationship between parole success and maintenance of strong family ties while in prison" in their reentry research studies); Grant Duwe et al., Blessed be the Social Tie that Binds: the Effects of Prison Visitation on Offender Recidivism," CRIM. JUST. POL'Y REV 1, 5 (2011) (explaining that "friends and family are a returning prisoner's most valuable source of support" and that they help the returning prisoner overcome "reentry obstacles, including unemployment, debt, and homelessness").

of the strength of family relationships following release. Other studies have shown that family contact during incarceration is associated with lower recidivism rates. Such contact can maintain or reinforce attachments to children, giving exiting prisoners a greater stake in conformity upon release....Maintaining and even strengthening family ties during incarceration can bolster the positive impact that family can have after a prisoner's release. 16

While inmates have been convicted of crimes, the families and close friends of these inmates should not be unjustly targeted to fund prison costs. Arguments made by correctional authorities and inmate telephone service providers to justify excessive rates and the payments of high commission rates to states and correctional authorities as essential revenue sources for state and prison inmate welfare funds and programs are smokescreens that miss the mark of what goes into the FCC's exercise of its reasonableness rate-making authority under the Act. Accordingly, we ask the FCC to protect our constituents and their families and other inmates by adopting regulations that will ensure reasonable interstate and intrastate rates for inmate calling services.

III. THE FCC SHOULD ELIMINATE PER-CALL CHARGES, ESTABLISH A REASONABLE PER-MINUTE RATE CAP FOR DEBIT, PRE-PAID, AND COLLECT CALLS, AND EXAMINE THE NEEDS OF PRISONERS WITH DISABILITIES

Among the numerous issues that the FCC has put out for comment, the FCC has solicited comment as to whether it should eliminate per-call charges on inmate phone calls and whether it should impose a per-minute rate cap. There is overwhelming evidence in the record that shows that imposing a separate per-call charge each time a payphone call is made, in addition to the per-minute charge, significantly inflates already-exorbitant telephone rates, and further deters inmate calling activity. Also, the Federal Bureau of Prisons, which has lower rates than a number of states, does not have a per-call charge or connection charge. ²⁰

As previously argued, the CBC urges the Commission to assert its jurisdiction over interstate and intrastate inmate calling rates in keeping with its authorizing statute. The FCC has the statutory authority, expertise and resources to determine a reasonable rate cap that does not disadvantage inmates depending upon the state of their incarceration. We urge the FCC to issue regulations to permit charges that are reasonable, not charges that generate excess revenues for the companies or prisons.²¹

18 NPRM at ¶18, 20.

¹⁹ NPRM at ¶18 (noting that the per-call charges can be as high as \$3.95).

¹⁶ H.R. REP. No 111-77, at 43 (2010).

¹⁷ NPRM at ¶37.

²⁰ U.S. Gov't Accountability Office, GAO-11-893, Bureau of Prisons: Improved Evaluation and Increased Coordination Could Improve Cell Phone Detection 12 (2011).

²¹ See Comments of Human Rights Defense Center, filed March 25, 2013, WC Dkt. 12-375, at 6 (indicating that \$.05 per minute is reasonable based on various transport and connection fees and citing other inmate calling service providers that charge that rate); see also Wright Comments at 17-25 (stating that \$.07 is reasonable based on various economic indicators and taking into account advances in technology and other fees the companies may need to pay).

We note that the two dominant phone companies failed to respond to the FCC's request to provide detailed cost data in opposition to the petitioners' proposed rate cap. In light of the proposed rates submitted by the Human Rights Defense Center, petitioners and other parties, which took into account various transport, connection and security fees, we think the petitioners' proposed rate of \$.07 per minute for interstate calls is reasonable.²²

The CBC urges the FCC to eliminate per-call charges for interstate and intrastate inmate phone calls for every correctional facility. The Commission should also determine and impose a reasonable per-minute rate cap for debit, pre-paid, and collect calls for both interstate and intrastate inmate calling services for every correctional facility.

The FCC should also closely examine the needs of prisoners with disabilities. As noted in the comment submitted by *Helping Educate to Advance the Rights of the Deaf*, deaf prisoners and their families face higher telephone rates because the rates do not account for the transmission time of TTY calls.²³

IV. THE FCC SHOULD ACT EXPEDITIOUSLY ON THIS MATTER

Because the FCC has not yet acted upon the Wright Petition nor decided upon the issues that have been raised in the NPRM, inmates' families and loved ones have had no alternative over the last decade but to continue paying exorbitant rates to call and receive calls from incarcerated family members and friends. For these reasons and because of the devastating and disproportionate impacts that the FCC's inaction has had on African-American and Hispanic families, we ask the FCC to act quickly on these matters, which have persisted for a decade more than was necessary without resolution.

²² Wright Comments at 3.

²³ Comments of Helping Educate to Advance the Rights of the Deaf, filed March 25, 2013, WC Dkt. 12-375, at 1.
²⁴ It should also be noted that due to the FCC's failure to commence a rulemaking in response to Martha Wright's 2003 petition, notwithstanding the Court's directive to the agency and its clear statutory jurisdiction to decide these issues, Martha Wright found it necessary to file a second, alternative petition with the FCC in 2007.

Sincerely,

Marcin d. Trulye

Marcia Fudge

Chair

Congressional Black Caucus

WW H. NA

Eleanor Holmes Norton

Chair

CBC Prison Telecomm Reform Working Group

Cc: The Honorable Robert M. McDowell, Commissioner

The Honorable Mignon Clyburn, Commissioner

The Honorable Jessica Rosenworcel, Commissioner

The Honorable Ajit Pai, Commissioner